86-565

Supreme Court, U.S.
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CLERK

No.

In The
Supreme Court Of The United States

OCTOBER TERM, 1986

JOHN R. MANSON, COMMISSIONER, CONNECTICUT DEPARTMENT OF CORRECTIONS,
Petitioner,

v.

MICHAEL ALSTON,
Respondent.

JOHN R. MANSON, COMMISSIONER, CONNECTICUT DEPARTMENT OF CORRECTIONS,
Petitioner,

v.

JAMES HASKINS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT WITH ATTACHED APPENDIX

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QUESTIONS PRESENTED

IN ITS ANALYSIS OF THE CONNECTICUT JURY SELECTION PROCESS, DID THE COURT BELOW PROPERLY CONCLUDE THAT THE OPERATION OF CONNECTICUT'S FORMER STATUTORY JURY QUOTA SYSTEM BROUGHT ABOUT UNDERREPRESENTATION OF POTENTIAL BLACK JURORS?

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law ....

United State Constitution, Amendment XIV:

...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law;

nor deny to any person within its jurisdiction the equal protection of laws.

Connecticut General Statute (1974), Section 51-220

The number of jurors to be chosen for each town shall be as follows: In towns whose population as determined by the last-completed census of the United States is less than seven hundred and fifty, fifteen; in towns whose population so determined is at least seven hundred and fifty but not more than one thousand five hundred, thirty; in towns whose population so determined is more than one thousand five hundred but not more than twenty-five hundred, fifty-six; in towns whose population so determined is more than twenty-five hundred but no more than five thousand,

ninety; in towns whose population so determined is more than five thousand but not more than ten thousand, one hundred twenty; in towns whose population so determined is more than ten thousand but not more than twenty-five thousand, two hundred twenty-five; in towns whose population so determined is more than twenty-five thousand but not more than fifty thousand, three hundred thirty-seven; in towns whose population so determined is more than fifty thousand but not more than one hundred thousand, six hundred seventy-five; in towns whose population so determined is more than one hundred thousand, one thousand and twelve; provided, for the purposes of this section, the population

of a town shall not include the patients of any state institution located in such town.

Rule 17.1

Revised Rules of the Supreme Court of the United States

Considerations Governing Review on Certiorari-

1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons thereof. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state or federal court of appeals has decided an impor-

tant question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JOHN R. MANSON, Commissioner,
Connecticut Department of Corrections
Petitioner,

v.

MICHAEL ALSTON,

JAMES HASKINS,
Respondents

Petition for Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit

---

x

Petitioner respectfully request a writ of certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Second Circuit, entered on May 23, 1986, which judgment reversed the respondent's convictions.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Second Circuit is attached hereto as Appendix A.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on May 23, 1986. This Court has jurisdiction to review that judgment by writ of certiorari pursuant to 28 U.S.C. § 1257.

STATEMENT OF THE CASE

The charges against the respondents arose out of their participation with others in the robbery of the New Haven Savings Bank in Westville section of New Haven, Connecticut on May 3, 1974.

The respondents were arrested on May 15, 1974 pursuant to a bench warrant; bond was fixed at $300,000.00. Shortly after being charged in the state court, they were indicted on federal bank robbery charges in the United States District Court for the District of Connecticut.

Following the imposition of sentence in federal court, respondents were brought to trial in state court in relation to the same incident. Evidentiary hearing on motions, jury selec-

tion, and trial consumed approximately eight months resulting in a verdict on August 28, 1975 of guilty of one count of assault in the first degree and one count of assault in the second degree. The respondents were sentenced to a term of not less than ten nor more than twenty-years imprisonment to run consecutively with the federal sentence. State v. Haskins, 188 Conn. 432, 450 A.2d 828 (1982);

Before their state trial, on appeal before the Connecticut Supreme Court and in their habeas corpus actions, the respondents challenged several aspects of the Connecticut jury selection process. In particular they challenged a town quota system established by the former Connecticut General Statutes § 51-220. The United States

District Court for the District of Connecticut found that this statute mandated under-representation of blacks on jury arrays in violation of the Equal Protection Clause. Alston v. Lopes, 621 F. Supp. 992 (D. Conn. 1985). In the subsequent appeal, the United States Court of Appeals for the Second Circuit affirmed. This petition followed.

REASONS FOR GRANTING THE PETITION

The Question of Whether a Statistical Deviation Analysis Can Properly Be Used To Prove Claims of Discrimination In A State Jury Selection Process Is a Topical Issue of Persuasive And Substantial Proportions Which Needs Clarification By This Court

The central contention of the respondents in this case has been that the estimated number of blacks represented in the criminal jury panel was a

direct result of the state's former method for summoning potential jurors. This conclusionwas available, however, only through use of the Statistical Decision Theory. In the present case, use of that statistical formulationwas seriously flawed.

Although this Court has in the past utilized a statistical formula in evaluating equal protection claims, in all previous cases there was no doubt of the actual number of minority members summoned for jury duty. See Vasquez v. Hillery, 106 S. Ct. 617 (1982); Castaneda v. Partida, 430 U.S. 482 (1977). In the present case, the court below mistakenly relied upon an estimation of both the number of minority members eligible for jury duty and the number of those selected. These

estimations alone are not sufficient to establish an equal protection violation.

Similarly, the courts below failed to take into account the fact that the Connecticut jury selection process involved a random selection process. Under this random procedure, a presumption of discriminatory intent is particularly inappropriate See J. Nowak, R. Rotunda and Young, Constitutional Law 602 (2d ed. 1983). The actual operation of the state jury selection process is the more appropriate focus for judicial consideration.

In the present case the courts below were wholly unconcerned with the operation of the state's jury selection process, relying instead upon theory and conjecture. A selection system in effect since at least 1875 was invali-

dated, despite the obvious legislative rationale. The fact that a better system might have existed,was insufficient reason to reverse these respondents' convictions.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 942, 943—August Term, 1985

(Argued March 20, 1986 Decided May 23, 1986)

Docket Nos. 85-2358, 85-2361

MICHAEL ALSTON,

Petitioner-Appellee,

—against—

JOHN R. MANSON, Commissioner,
Connecticut Department of Correction,

Respondent-Appellant.

JAMES HASKINS,

Petitioner-Appellee,

—against—

JOHN R. MANSON, Commissioner,
Connecticut Department of Correction,

Respondent-Appellant.

Before:

KAUFMAN, TIMBERS and MINER,
Circuit Judges.

John R. Manson, Commissioner of the Connecticut Department of Correction, appeals from judgments of the United States District Court for the District of Connecticut (T. F. Gilroy Daly, *Chief Judge*), granting Alston's and Haskins's petitions for writs of *habeas corpus*.

Affirmed.

Judge Miner dissents in a separate opinion.

DAVID N. ROSEN, New Haven, Conn., *for Petitioner-Appellee Alston.*

JOHN R. WILLIAMS, Esq., New Haven, Conn., *for Petitioner-Appellee Haskins.*

JULIA DICOCCO DEWEY, Assistant State Attorney, New Haven, Conn., *for Defendant-Appellant.*

KAUFMAN, *Circuit Judge*:

Drawn from hamlet and metropolis alike, jurors daily give life to the ancient right, enshrined in the Magna

Carta and the Constitution, to a trial by jury of one's peers. Although now summoned by statute instead of the medieval sheriff's writ of *venire facias*, a representative jury array remains the expression of the community's role in securing this fundamental right. Accordingly, both the sixth and fourteenth amendments mandate that prospective jurors be chosen free of the taint of racial discrimination.

It is the interplay of these two provisions that is now before us. The State of Connecticut appeals from judgments of the United States District Court for the District of Connecticut, granting Alston's and Haskins's petitions for writs of *habeas corpus*. Using modern statistical data, the district court ruled that the jury selection system employed in 1975 in Connecticut state court, where the petitioners were tried, violated the equal protection clause. Agreeing with Chief Judge Daly's analysis, we affirm.

BACKGROUND

A brief factual statement is necessary to understand the law in this complex area. In Connecticut, each county compiles a jury array. Conn. Gen. Stat. §§ 51-217 *et seq.* Each town in the county, in turn, furnishes a number of prospective jurors. Unfortunately, section 51-220 established a strict quota system which favored representation of the smaller towns. As an illustration, the smallest town in New Haven County, Beacon Falls, contributed 4.2% of its adult population to the array. In contrast, New Haven, the largest town, was limited by statute to assigning a mere 1.1% of its adults. It is undisputed that a larger concentration of the black population in Connecticut

lives in the more populated urban settings. Accordingly, § 51-220 was repealed in 1982. Conn. Public Act 82-307 § 2.

The jury that convicted Michael Alston and James Haskins, however, was chosen from an array skewed in favor of the white majority. Alston, Haskins, and a co-defendant were convicted in state court of assaulting two police officers while fleeing the scene of a New Haven bank robbery. Each had previously been convicted in federal court of the underlying robbery. Both Alston and Haskins appealed their convictions to the Connecticut Supreme Court, presenting, *inter alia*, the same constitutional grounds supporting their subsequent *habeas corpus* petitions. The supreme court ruled that the jury selection system passed constitutional muster. *State* v. *Haskins*, 188 Conn. 432, 436-41 (1982). Currently, Alston is on parole from both his state and federal convictions. Haskins is still incarcerated in federal prison and has not yet begun to serve his state sentence of ten years.

Subsequently, Alston and Haskins filed *habeas corpus* petitions in United States district court. The petitions contended, *inter alia*, that the statutory scheme for selecting the array evidenced an intent to discriminate against blacks in contravention of the equal protection clause. They also argued that blacks were substantially underrepresented among the potential jurors, a violation of the sixth amendment. At a later hearing, a professor of statistics from Yale University testified to the adverse effect upon black representation produced by the existing town quotas. The statistician estimated the number of blacks summoned was 368. In the absence of § 51-220, however, the number would have been closer to 501. The total number in the array was 8,405.

Relying on these figures, the district judge decided the Connecticut plan violated the fourteenth amendment. Employing the three-prong test set forth in *Castaneda* v. *Partida*, 430 U.S. 482 (1977), Chief Judge Daly found the petitioners had established a *prima facie* case of racial discrimination, and that the State had failed to rebut this showing. *Alston* v. *Lopes*, 621 F.Supp. 992 (D.Conn. 1985).

The district court easily found the first and third branches of the *Castaneda* test had been satisfied. The first requirement is that the excluded group be cognizable. Because blacks comprised the group underrepresented, this standard was clearly met. Similarly, the third part of the standard, establishing that the selection procedure was not racially neutral, was also on firm footing. All parties agree a high proportion of blacks live in the City of New Haven, and that the quota system could not help but partially exclude them.

The district court, therefore, devoted most of its analysis to the second *Castaneda* standard: whether the underrepresentation of blacks was substantial. Through the use of an established and accepted data device, Statistical Decision Theory, the district judge determined that the odds against chance alone accounting for the low number of blacks were simply astronomical. Indeed, Chief Judge Daly noted the likelihood of only 368 blacks appearing as potential jurors was three chances in one billion.

Having found that Alston and Haskins had established a *prima facie* case of intentional discrimination, the district court then inquired whether the State had rebutted that showing. Connecticut, however, persisted in

asserting that the discrepancy was due to the voter registration lists instead of the town quota system. But, Chief Judge Daly observed that blacks would be underrepresented even if the use of voter rolls was abandoned, and accordingly deemed the State's argument inapposite. As a result, the district court found that Connecticut presented no evidence of a neutral intent motivating the system and granted the petitions for *habeas corpus*. These appeals followed.

DISCUSSION

Before us now is the seemingly narrow question whether the underrepresentation of blacks in the 1975 array was "substantial." Specifically, we must determine whether the presence of an estimated 368 blacks instead of 501 gave rise to a presumption of discriminatory intent. Our answer, however, requires a careful delineation of the constitutional standards governing selection of potential jurors.

The equal protection clause of the fourteenth amendment condemns underrepresentation of minorities only if it is the product of intentional discrimination. The Supreme Court, however, has squarely held that substantial underrepresentation of a cognizable group can establish a *prima facie* case of discriminatory purpose. *Castaneda* v. *Partida*, *supra*, 430 U.S. 482. In *Castaneda*, a *habeas corpus* petitioner alleged that his indictment by a grand jury on which Mexican-Americans were underrepresented violated the fourteenth amendment. The High Court established a tripartite analysis for analyzing this claim. A *prima facie* case is made, stated the Court, if a cognizable group is substantially underrepresented and if the selec-

tion procedure is not racially neutral. *Id.* at 494-95. In *Castaneda*, as here, the Court found that the State was unable to rebut the presumption of discrimination raised by statistical evidence. *Id.* at 501.

We agree with the district court that the three branches of the *Castaneda* test were satisfied. Blacks, of course, form a cognizable group. *Carter* v. *Jury Commission*, 396 U.S. 320 (1970). Moreover, the third requirement of *Castaneda*—that the jury selection system is not racially neutral—is also fulfilled. The ineluctable effect of the statutory scheme was to reduce the number of potential jurors drawn from large towns, especially New Haven, where it is undisputed that a larger proportion of blacks resided.

Turning to the central issue of this appeal, we hold that blacks were substantially underrepresented as a result of Connecticut's earlier jury selection system. The reliable tool referred to as Statistical Decision Theory is an appropriate instrument for analyzing whether minority underrepresentation in the jury array is substantial. The goal of such an inquiry is to determine if chance alone could account for a meager representation of minorities. *See, e.g., Castaneda*, 430 U.S. at 494 n. 13; *Smith* v. *Texas*, 311 U.S. 128, 1331 (1940). The Statistical Decision Theory formulation resulted from an effort to determine what one effect, chance, could have on the flux of events, and is therefore an appropriate and acceptable augmentation to the legal arsenal. It has been adopted in the context of employment discrimination. *See Board of Education* v. *Califano*, 584 F.2d 576, 584 n.29 (2d Cir. 1978). Moreover, modern statistical approaches have been employed by other courts in jury selection cases. *Castaneda*, 430 U.S. at 496 n.17; *Moultrie* v. *Martin*, 690

F.2d 1078 (4th Cir. 1982); *Villafane* v. *Manson*, 504 F.Supp. 78 (D.Conn. 1980); *see generally* Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases*, 80 Harv. L.Rev. 338 (1966) (mathematical description of theory).

The Statistical Decision Theory formulation may be summarized as a set of mathematical calculations that indicate whether an observed outcome could reasonably be ascribed to chance. The district court found, for example, that the expected number of blacks in the array was 501. Surely, however, a violation would not be found if the actual number turned out to be 500 or 490. Such a result could easily have resulted from random factors. In contrast, the estimated number of blacks who would have actually served on the array in light of the quota system was 368. The odds of such a result occurring through happenstance are an incredible three in one billion. Accordingly, in light of the scant likelihood of the Connecticut result, the district court correctly ruled that the State had the burden of producing a plausible justification for § 51-220.[1]

Although not disputing the figures relied upon below, the State objects that the proper standard was the absolute disparity of blacks excluded. Under this view, one would first note that the array should have been 5.96% black. Instead, 4.38% of the prospective jurors were

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[1] Our dissenting brother's point is that the quota system, applied in tandem with the voter registration requirement, might in practice not exclude blacks. The State, however, had the burden of proving the validity of this claim. In *Castaneda*, as here, the percentage of minority potential jurors was compared to the minority percentage of the population, despite the existence of a presumably licit voter registration requirement. 430 U.S. at 485-86. Moreover, the estimated number of blacks summoned was more than fair to the State, as Judge Miner agrees.

black. Connecticut argues the resulting discrepancy of 1.58% is not significant. *United States* v. *Jenkins*, 496 F.2d 57 (2d Cir. 1974), *cert. denied*, 420 U.S. 925 (1975).

The State, however, has confused equal protection and sixth amendment standards. In an analysis pursuant to the sixth amendment, a disparity can constitute a *per se* violation of an accused's right to trial by jury. *Duren* v. *Missouri*, 439 U.S. 357 (1979). In *Jenkins*, *supra*, we ruled that a difference of one black in a pool of 60 jurors was not substantial. 496 F.2d at 66. In the instant case, however, the use of statistics was not to establish a violation itself, but to raise the presumption of discriminatory intent. The Statistical Decision Theory analysis is ideally suited for shedding light on this issue because it reveals the possible role of chance and works well where a small sample is involved, as here. *Villafane*, *supra*, 504 F.Supp. at 86.

Nonetheless, in light of *Jenkins*, our result might appear anomalous. The State argues that the town quota system would not violate the sixth amendment, although it is generally thought to set forth a more stringent standard than the equal protection clause. The sixth amendment is stricter because it forbids any substantial underrepresentation of minorities, regardless of whether the State's motive is discriminatory. The fourteenth amendment, however, imposes the additional requirement of discriminatory purpose. In this case, it appears that a constitutional transgression was more easily established pursuant to the equal protection clause, despite the added burden of proving intent.

The answer to this seeming quandary is easily available. First, as the appellees strenuously urge, the absolute

disparity approach employed in *Jenkins* may be outmoded and should be discarded. In light of our fourteenth amendment analysis, however, we need not reach this question, and therefore decline to do so. Nonetheless, if this Court should subsequently apply modern statistical theory to the sixth amendment as well as the fourteenth, then the two constitutional analyses would be more congruent. In that case, it would be unlikely that a jury selection system would be found to violate the equal protection clause, but not the sixth amendment.

More importantly, the statistics herein employed raised only a presumption of discrimination. The State was free to rebut this presumption, but failed to do so. Indeed, Chief Judge Daly flatly stated that "[n]o attempt has been made to demonstrate that the town quota system serves a legitimate state purpose." 621 F.Supp. at 998.

Accordingly, the judgments of the district court granting Alston's and Haskins's petitions for *habeas corpus* are affirmed.

MINER, *Circuit Judge*, dissenting:

Because I believe that the statistical analysis employed by the petitioners was seriously flawed and therefore insufficient to raise the presumption of discriminatory intent, I respectfully dissent.

Since the Connecticut quota system for summoning jurors favored representation of the smaller towns, the district court concluded that the statute discriminates against blacks, who reside predominately in the more populated regions of the county. The conclusion was

based entirely on the expert testimony of a statistician, who estimated that 368 blacks would be summoned under the quota system instead of the 501 who would appear if they were summoned in proportion to their representation in the entire county population.

Apparently lacking information as to the number of blacks registered to vote and therefore eligible for jury duty, the statistician presumed black voter registration (as well as white voter registration) to be 100% of the adult population for the purposes of his model. This approach was believed to be more than fair, because the effect of the voting registration requirement was to decrease the number of blacks actually summoned. Indeed, the State conceded that the use of voter lists "has traditionally resulted in an under-representation of blacks for blacks as a group tend to register to vote less frequently than do whites." Brief for the Appellant at 5.

In order to find intentional discrimination on the part of the State of Connecticut, however, it is not enough simply to demonstrate an underrepresentation of blacks in the array of jurors. What must be shown is that the Connecticut statute *brought about* that underrepresentation. In the absence of actual information as to the number and distribution of blacks registered to vote, i.e., eligible for jury service, in the county population, that showing cannot be made. The reason it cannot is that the black proportion of those registered to vote in the towns *may be greater* than the black proportion of those registered to vote in the city, and the statute, since it favors the towns, would therefore have no pernicious effect insofar as jury service by blacks is concerned. Underrepresentation of blacks, if found under those circumstances, would

be due to some factor other than the statute challenged by these petitioners.

Two other considerations favor the denial of the writ sought by the petitioners. First, the number of blacks in the array summoned under the challenged statute is estimated. In previous cases involving fourteenth amendment violation claims, the actual number of the minority members summoned was known. *Vasquez v. Hillery*, 106 S. Ct. 617 (1986) (total absence of blacks from grand juries was known fact); *Castaneda v. Partida*, 430 U.S. 482 (1977) (actual number of Mexican-Americans summoned over an extended period was "observed"); *Villafane v. Manson*, 504 F. Supp. 78 (D. Conn.) (actual percentage of Puerto Ricans in the electorate, as well as actual number summoned, was known), *aff'd mem.*, 639 F.2d 770 (2d Cir. 1980). Here, not only is the actual number of blacks summoned under the quota system unknown, but the estimate is not even based on the universe of blacks *eligible* for jury duty. Second, the use of statistical models to prove claims of discrimination in jury selection procedures has been limited heretofore to cases involving a subjective selection process. J. Nowak, R. Rotunda & J. Young, *Constitutional Law* 602 (2d ed. 1983); *see Brown v. Allen*, 344 U.S. 443 (1953). When, as here, jurors are selected randomly, in accordance with objective statutory criteria, there is no basis for the use of statistical analysis to raise a presumption of discriminatory intent. Under these circumstances, we are required to presume that the statute meets constitutional standards, absent a showing of discriminatory intent on the part of the legislature. *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977).

We deal here with two people who stand convicted of serious crimes involving the wounding of police officers by gunfire in the course of a robbery. Their convictions were affirmed after appeal to the Connecticut Supreme Court, where the same argument presented here was advanced and rejected. Before granting the writ to these petitioners, thereby making possible the release of an unknown number of offenders convicted by juries drawn under the challenged statute, I would at least remand to the district court for further findings as to the *actual operation* of Connecticut's statutory jury quota system.

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SUPPLEMENTAL APPENDIX

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UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

MICHAEL ALSTON,	:	
Petitioner,	:	
VS.	:	Civil No. B-83-464
RAYMOND LOPES,	:	(TFGD)
Respondent.	:	

JAMES HASKINS,	:	
Petitioner,	:	
VS.	:	Civil No. H-82-1006
RAYMOND LOPES,	:	(TFGD)
Respondent.	:	

RULING ON PETITIONS FOR WRITS OF HABEAS CORPUS

Petitioners Michael Alston and James Haskins were arrested in New Haven on May 3, 1974 in connection with the armed robbery of a New Haven Savings Bank branch. Petitioners were later tried and convicted of armed robbery in United States District Court and each received twenty-five year sentences. Petitioners then were brought to trial in Connecticut Superior Court on state assault charges for the shooting of two New Haven police officers which occurred as petitioners attempted to evade police custody following the robbery. Both petitioners were convicted and, on appeal to the Connecticut Supreme Court, the convictions were affirmed. *State v. Haskins,* 188 Conn. 432, 450 A.2d 828 (1982).

After having exhausted their state remedies,[1] petitioners applied to this Court for writs of habeas corpus. Petitioners challenge the jury selection system in New Haven County on grounds that the exclusion or underrepresentation of various groups violated their constitutional rights under the Sixth and Fourteenth Amendments. Petitioners claim that Blacks, women, students, indigents, certain age groups, persons with

low levels of education, felons, those who expressed a dissatisfaction with the United States government, and those engaged in certain occupations were either unconstitutionally excluded or substantially underrepresented on the jury arrays. In addition to their jury selection claims, the petitioners allege a denial of constitutional rights resulting from the exclusion of certain identification testimony, limitations placed on cross-examination, and the trial court's refusal to allow the questioning of jurors concerning the possible influences of pre-trial publicity. The Connecticut Supreme Court dismissed all of the petitioners' claims and affirmed the convictions. *State v. Haskins,* 188 Conn. 432, 450 A.2d 828 (1982). Since the Court finds the underrepresentation of Blacks caused by the jury selection system violated the equal protection clause of the Fourteenth Amendment, only the petitioners' jury selection claims will be addressed.

Jury Selection Claims

Petitioners claim that the Connecticut jury selection procedure, as prescribed by former Connecticut General Statutes Section 51-220, caused a substantial underrepresentation of Blacks on the New Haven County jury array, thereby depriving them of equal protection of the laws in violation of the Fourteenth Amendment. In support of their claim, the petitioners have introduced evidence at a hearing before the Court consisting of a statistical analysis of the claimed underrepresentation caused by section 51-220.

The Connecticut statute in question assigns towns falling within a specified population range a fixed quota of jurors that each town must fill in supplying jurors to the county jury array. The town quota system, however, does not fix the quota of jurors in proportion to the size of the town's population. Petitioner's exhibit 2 demonstrates the results of the failure to make the town's quota proportionate to the size of its population. Beacon Falls is the smallest town in New Haven County with a population of 3,546. According to section 51-220,

Beacon Falls is required to meet a quota of ninety jurors. New Haven is the largest city in New Haven County with a population of 137,707. New Haven has a quota of 1,012 jurors. Yet, 90 jurors represents 2.5% of Beacon Fall's population, while 1,012 jurors represents only 0.7% of New Haven's population. Petitioners thus allege that the town quota system creates a bias in favor of overrepresenting small towns on the jury arrays in New Haven County, while underrepresenting large towns.

Using census figures taken from the 1970 census of New Haven County, the petitioners demonstrated a correlation between the size of an individual town's population and the proportionate size of its Black community. These figures indicate that in smaller towns, the Black population makes up a smaller percentage of the town's population than in larger towns where the percentage of the Black population is proportionately higher. The petitioners argue that Blacks are therefore underrepresented on jury arrays since the statute causes an overrepresentation of smaller towns on the jury array with proportionately smaller Black populations than those of larger towns and cities.

In their petitions, Alston and Haskins have quantified the claimed exclusion of Blacks from the jury array by comparing the estimated number of Black jurors appearing in an array representative of the Black population with the expected number of Blacks appearing in an array formed by the town quota system. More specifically, in a representative array of 8,405 prospective jurors, 501 Black jurors ought to appear, since the population of New Haven County is 5.96% Black. Under the town quota system, however, the expected number of Black jurors falls to 368. According to petitioners, the town quota system creates an exclusion of 133 Black jurors from the number one would expect to find had the jury array been representative of the entire community.

To demonstrate the significance of the claimed exclusion, the petitioners employ a statistical probability analysis which

calculates the probability of such an exclusion occuring by chance at less than three in one billion. The state does not challenge the accuracy or propriety of these statistics, but rather contends that any underrepresentation of Blacks on the New Haven County jury array was due to the voter registration lists used to select jurors within each town.

Discussion

The United States Supreme Court in *Casteneda v. Partida*, 430 U.S. 482 (1977), established the elements of a *prima facie* case challenging jury selection procedures which violate the Fourteenth Amendment. First, a defendant must show that the excluded group is distinctive and cognizable within the community. *Id.* at 494. Second, the underrepresentation must be substantial. *Id.* This showing of substantiality is also known as the "rule of exclusion." As a third consideration, the Court noted that a selection procedure which is susceptible of abuse or not racially neutral, lends further support to a statistical showing of purposeful discrimination. *Id.* Once a defendant has established a *prima facie* case under *Casteneda*, the burden of proof shifts to the state to rebut a presumption of intentional discrimination by showing that the manner of jury selection serves a legitimate state purpose. *Id.* at 497–98.

The petitioners have met the first element of an equal protection challenge under *Casteneda*. The Supreme Court has expressly recognized that Blacks are a cognizable group for purposes of challenging jury selection procedures in *Carter v. Jury Commission*, 396 U.S. 320 (1970). Petitioners have also satisfied *Casteneda's* third criterion in making out a *prima facie* challenge to the jury selection statute. Even assuming that the town quota system was mechanically applied and devoid of any subjective determinations made by jury selection officials, the statute operates directly to exclude Blacks from the jury array. Since the statute itself mandates the exclusion of Blacks, evidence of abuse in its application is

irrelevant to the issue of discriminatory intent on the part of the legislature. The very structure of the statute provides support for the presumption of discriminatory purpose raised by the statistical showing.

The remaining issue then is whether petitioners have satisfied the rule of exclusion as *Casteneda's* second element of an equal protection claim. As noted above, the petitioners rely heavily on a probability analysis in demonstrating that the claimed exclusion is substantial. This method of determining substantial underrepresentation is known as Statistical Decision Theory (SDT). Proponents of SDT stress that it is a more precise indicator of intentional underrepresentation than that measured by the absolute disparity method. *See* Finklestein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases,* 80 Harv. L. Rev. 338 (1966). The absolute disparity test compares the percentage of the excluded group appearing on jury arrays with the percentage of the group appearing in the general population. Statistical Decision Theory, however, measures the probability that a given exclusion would occur by chance rather than by design. Under this analysis, a low probability that an exclusion would occur merely by chance has been considered sufficient to raise a presumption of discriminatory intent. *See, e.g., Casteneda v. Partida,* 430 U.S. at 496 n.17; *Villafane v. Manson,* 504 F. Supp. 78 (D. Conn. 1980); *Hillery v. Pulley,* 563 F. Supp. 1228 (E.D. Cal. 1983).

Unlike the absolute disparity method, SDT takes into account the size of the group being evaluated. *See Moultrie v. Martin,* 690 F.2d 1078, 1083 (4th Cir. 1982). This analysis is particularly useful when the population being considered is relatively small. *Id.* at 1083. Where the excluded group represents only a small percentage of the entire community, the difference between the percentage of the group appearing on the jury array and the percentage of the group appearing in the general population is correspondingly small. As measured by the absolute disparity method, small disparities are not considered sufficient to satisfy the substantiality

requirement. *See, e.g., Swain v. Alabama*, 380 U.S. 202 (1965) (11-16% disparity insufficient under Fourteenth Amendment). Statistical Decision Theory, however, can accurately measure the probability of intentional discrimination even where small samples are involved. *See Moultrie*, 690 F.2d at 1083; *Villafane*, 504 F. Supp. at 86. Accordingly, application of SDT is particularly appropriate where, as here, the excluded group comprises only a small percentage of the total population.

In *United States v. Zimmerli*, Crim. No. B-83-57 (D. Conn. 1984), this Court refused to apply SDT to a challenge to grand and petit jury selection procedures utilized in this district. These challenges were based on the Sixth Amendment to the United States Constitution and the Jury Selection and Service Act of 1968. 28 U.S.C. § 1861 *et seq.* (1982). Instead, reliance was placed on *United States v. Jenkins*, 496 F.2d 57 (2d Cir. 1974). *Jenkins* held that disparities which do not result in a significant numerical difference in the composition of actual jury arrays are insufficient to establish a violation of the Constitution or the Jury Selection and Service Act. *Id.* at 65. Significantly, intent was not a required element of either challenge to the jury selection procedures made in *Zimmerli*. This added element of intent in equal protection cases distinguishes *Zimmerli* from the case at bar when selecting the appropriate gauge to be used in determining substantial underrepresentation.

In *Duren v. Missouri*, 439 U.S. 363, 368 n.26 (1979), the Supreme Court noted that evidence of a significant discrepancy must represent not only discriminatory effect in an equal protection claim, but also discriminatory purpose. The Court distinguished this showing of intent from that required under a Sixth Amendment challenge where "systematic disproportion itself" is sufficient to establish a *prima facie* claim. *Id.* Thus, in equal protection cases where intent must be shown in addition to disparate treatment, courts have appropriately resorted to the more precise analysis employed by Statistical Decision Theory. *See, e.g., Casteneda*, 430 U.S. at 496 n.17;

Hazelwood School District v. United States, 433 U.S. 299, 311 n.17 (1976) (employment discrimination); *Board of Education of City School Dist. of New York v. Califano*, 584 F.2d 576, 584 n.29 (2d Cir. 1978) (employment discrimination); *Moultrie v. Martin*, 690 F.2d 1078 (9th Cir. 1982) (jury selection); *Villafane v. Manson*, 504 F. Supp. 78 (D. Conn. 1980) (same); *Hillery v. Pulley*, 563 F. Supp. 1228 (E.D. Cal. 1983) (same); *State v. Castonguay*, 194 Conn. 416, 427–28, 481 A.2d 56, 63 (1984) (same).

Applying SDT to the case at bar, the petitioners clearly have satisfied the rule of exclusion set out in *Casteneda*. As noted above, the probability of an exclusion of 133 Black jurors out of an array of 8405 occuring by chance is less than three in one billion. This highly remote probability is sufficient to create a presumption of purposeful discrimination regarding the exclusion of Black jurors caused by § 51-220.[2]

Having satisfied the three requirements under *Casteneda*, the Court concludes that petitioners have met their burden in establishing a *prima facie* case of discrimination in the jury selection process. The state argues, however, that any disparate treatment of Blacks on the New Haven County jury array is due solely to the use of voter registration lists in selecting jurors. According to the state, since Blacks register to vote in smaller proportions than do whites, the underrepresentation can be explained on grounds apart from the statute. This argument fails to recognize the fact that the statute operates directly to exclude Blacks. Even if no voter registration lists were used, an underrepresentation of Blacks on the jury array would still result. Therefore, the use of voter registration lists is irrelevant to the determination of the disparate treatment caused by section 51-220 itself. The state offers no other explanation for the exclusion of Blacks. No attempt has been made to demonstrate that the town quota system serves a legitimate state purpose. Thus, the presumption of purposeful discrimination raised by the petitioners has gone unrebutted. Accordingly, Alston's and Haskins' petitions for writs of habeas corpus are hereby GRANTED. The petitioners shall be

released from state custody unless the state moves for retrials within 30 days of today's date.

Dated at Bridgeport, Connecticut this 4th day of November, 1985.

/s/ T.F. Gilroy Daly

T.F. GILROY DALY, CHIEF JUDGE
UNITED STATES DISTRICT COURT

FOOTNOTES

[1] While neither party has raised the exhaustion issue, the Court notes that both Alston and Haskins have exhausted their available state remedies in challenging the jury selection process on equal protection grounds. The exhaustion doctrine, codified in 28 U.S.C. § 2254(b), "is rooted in a policy of federal-state comity by giving the state the initial opportunity to pass upon and correct alleged violations of its prisoners' federal constitutional rights." *Klein v. Harris*, 667 F.2d 274, 282 (2d Cir. 1981) (citing *Picard v. Connor*, 404 U.S. 270, 275, (1971)). The Supreme Court of Connecticut, however, refused to address petitioner Haskins' equal protection claim, because it had not been fully briefed and therefore was considered abandoned. *State v. Haskins*, 188 Conn. 432, 469, 450 A.2d 828, 848-849 (1982). This Court nevertheless finds that the Connecticut Supreme Court had ample opportunity and sufficient facts before it to address both petitioners' equal protection claims.

The exhaustion doctrine requires that a state defendant "fairly present" his federal constitutional claim to the state courts before seeking habeas relief. *Picard v. Connor*, 404 U.S. 270, 275 (1971). The defendant need not cite chapter and verse of the Constitution to satisfy this requirement, but rather can do so by:

(a) relying on pertinent federal cases employing constitutional analysis,

(b) relying on state cases employing constitutional analysis in like fact situations,

(c) asserting his claim in terms so particular as to call to mind a specific right protected by the Constitution, or

(d) alleging a pattern of facts that is well within the mainstream of constitutional litigation.

Daye v. Attorney General of State of New York, 696 F.2d 186, 194 (2d Cir. 1982), *followed in Cousart v. Hammock*, 745 F.2d 776 (2d Cir. 1984). Indeed, "explicit labeling is not a *sine qua non* of exhaustion." *Id.* at 195. Rather, the requirement may be satisfied if the defendant's state brief contains both a factual basis for his claim and such words as "under the due process clause" or "under the Constitution." *Klein v. Harris*, 667 F.2d at 282. Under these circumstances, the state court would surely have notice of the constitutional claim the defendant raises and is free to request further briefing from the parties if it feels briefing is appropriate or if it is otherwise dissatisfied with the legal arguments presented to date.

In the present case, both Alston's and Haskins' briefs provided ample language so as to alert the Connecticut Supreme Court to the equal protection challenge to the jury selection process. As the Connecticut

(continued)

[1] continued
Supreme Court noted, petitioner Alston's state court brief includes a point heading challenging the composition and selection of the jury array under the due process clause and the *equal protection* clause. *State v. Haskins*, 188 Conn. at 469, 450 A.2d at 848, 849 (referring to Brief for Defendant Alston at 18). Additionally, Alston relies on pertinent federal precedent by citing to *Castaneda v. Partida*, 430 U.S. 482, 494, 495 (1977), which sets forth the elements of a *prima facie* equal protection challenge to a jury selection process. Brief for Defendant Alston at 20.

Petitioner Haskins, as well, cites to *Castaneda*, Reply Brief for Defendant Haskins at 2, and goes a step further to adopt the arguments and claims of his co-defendants. Brief for Defendant Haskins at 233. So doing, Haskins also provided sufficient notice to the Connecticut Supreme Court of an equal protection claim. Finally, petitioners' state court briefs are replete with facts sufficient to support an equal protection claim. This Court therefore finds that in light of the Second Circuit's standard for exhaustion the petitioners' briefs provide ample evidence of exhaustion in this case.

[2] The Connecticut General Assembly has since repealed that portion of § 51-220 under which petitioners' jury array was selected and which the Court today finds to be unconstitutional. *See* 1982 Conn. Legis. Serv. 82-307 (West).

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

MICHAEL ALSTON	:	
	:	
v.	:	CIVIL B-83-464 (TFGD)
	:	
JOHN R. MANSON	:	

JUDGMENT

This cause came on for consideration on a petition for Writ of Habeas Corpus by the Honorable T. F. Gilroy Daly, Chief, United States District Judge, and

The Court having considered the petition and all the papers submitted in connection therewith filed its Ruling on Petition For a Writ of Habeas Corpus, granting the petition and ordered that petitioner be released from state custody unless the state moved for a retrial within 30 days of November 5, 1985, and it appearing that defendant has not filed a motion for a new trial,

It is therefore ORDERED and ADJUDGED that judgment be and is hereby entered for the petitioner and petitioner shall be released from state custody in accordance with the Court's Ruling on November 5, 1985.

Dated at Bridgeport, Connecticut this 5th day of Decmeber, 1985.

KEVIN F. ROWE, Clerk

By /s/ Carol E. Cannady

Carol E. Cannady
Deputy in Charge

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

JAMES HASKINS	:	
	:	
v.	:	CIVIL H-82-1006 (TFGD)
	:	
JOHN R. MANSON	:	

JUDGMENT

This cause came on for consideration on a petition for writ of habeas corpus by the Honorable T. F. Gilroy Daly, Chief, United States District Judge, and

The Court having considered the petition and all the papers submitted in connection therewith filed its Ruling on Petition For a Writ of Habeas Corpus, granting the petition and ordered that petitioner be released from state custody unless the state moved for a retrial within 30 days of November 5, 1985, and it appearing that defendant has not filed a motion for a new trial,

It is therefore ORDERED and ADJUDGED that judgment be and is hereby entered for the petitioner and petitioner shall be released from state custody in accordance with the Court's Ruling on November 5, 1985.

Dated at Bridgeport, Connecticut this 5th day of December, 1985.

KEVIN F. ROWE, Clerk

By /s/ Carol E. Cannady

Carol E. Cannady
Deputy in Charge

Supreme Court, U.S.
FILED
JAN 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

(3)

NO. 86-565

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

JOHN R. MANSON, COMMISSIONER,
CONNECTICUT DEPARTMENT OF CORRECTIONS,
Petitioner,

v.

MICHAEL ALSTON,
Respondent.

JOHN R. MANSON, COMMISSIONER,
CONNECTICUT DEPARTMENT OF CORRECTIONS,
Petitioner,

v.

JAMES HASKINS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

After exhausting their state remedies after conviction in a joint state criminal trial, respondents brought consolidated habeas corpus actions in United States District Court challenging, among other things, the method of jury selection at their trial. Their principal challenge, and the only one addressed by the courts below, was to a feature of the Connecticut jury selection process which has since been repealed, Public Act 82-307 (1982). The former Conn. Gen. Stats. Section 51-220 established a system for selection of members of the annual jury array for each county under which by law the largest cities provided a smaller fraction of their population for jury service than did the smaller towns.

Because in New Haven County, as in the other counties in Connecticut, virtually the entire Black population of the county resides in the underrepresented large cities, the inevitable result of this town quota system was to underrepresent Black citizens on the jury array.

The District Court found that this underrepresentation existed and was at least prima facie evidence of an intentional underrepresentation of Blacks on the jury array. Because the state never proffered any defense of the town quota system, resting its case entirely on a criticism of respondent's statistics, the District Court found respondents' discrimination case unrebutted and accordingly held that the town quota system deprived them of the equal protection of the laws.

On appeal, the United States Court of Appeals for the Second Circuit affirmed, one judge dissenting. The Court of Appeals approved the findings of the trial judge that the underrepresentation of Blacks was an inevitable feature of a jury selection system which underrepresented the communities where almost all Blacks lived and agreed that absent any proffer of a justification for this scheme of underrepresentation, respondents were entitled to prevail. Dissenting, Judge Miner would have "at least remand[ed] to the district court for further findings...." Pet. for Cert. App. at 3571. In his view the evidence did not exclude the possibility that underrepresentation of the communities where most Blacks reside might be counterbalanced by relative overrepresentation of Blacks among those

eligible for jury service compared to their representation in the population as a whole in the other communities. Additionally, Judge Miner thought the use of statistical techniques to analyze jury underrepresentation inappropriate where, as here, the claimed mechanism of exclusion was a statute rather than a subjective process. Pet. for Cert. App. at 3570.

REASONS FOR DENYING THE WRIT

The petition presents essentially a factual question, to which both courts below gave the obviously correct answer. The sole question presented is whether "the operation of Connecticut's former statutory jury quota system brought about underrepresentation of potential Black jurors." Pet. for Cert. i. Both courts

below concluded based upon the uncontroverted evidence presented that the answer to that question is "yes." This conclusion does not depend on advanced analytic tools. It is simply common sense that if almost all the Black residents of New Haven county lived in the largest cities, and the residents of these cities were underrepresented on the jury array, then as a result Blacks would be underrepresented on the array.

The evidence before the district court quantified the extent of the underrepresentation created by the town quota system. Using the percentage of Blacks in the population of each town in New Haven County, and the extent of under- or overrepresentation of that town on the array, the district court found the amount of underrepresentation of Blacks to be

expected in the array considering the scope of the underrepresentation of the communities where they resided. The district court found that instead of approximately 501 Blacks in an array representative of the adult population of New Haven County, an array which was fully representative of the Black population of each city and town in the county but in which the cities in which Blacks chiefly resided were underrepresented as mandated by statute, the number of Blacks would be expected to be 368. Supp. Pet. for Cert. App. 3.

The only use of the tools of statistical decision theory by the courts below was their mathematical confirmation that the difference between 368 and 501 expected jurors was larger than the differences which might be expected to

arise by chance absent systematic factors causing underrepresentation. Thus the courts below addressed and properly answered a rather easy factual question: underrepresentation of communities where Blacks reside may reasonably be found to imply underrepresentation of the Blacks who reside in those communities. To be sure, the courts below went on to draw the legal conclusion that this underrepresentation was probative of a discriminatory intent, applying the standards of Castaneda v. Partida, 430 U.S. 482 (1977), but this conclusion is not at issue in this case. The petition for certiorari does not raise any question regarding the propriety of an inference of discrimination from a showing of underrepresentation. It challenges only the sufficiency of the showing of underrepresentation itself. Because the

existence of this showing is a factual question properly resolved by the courts below, and because the resolution of this factual question raises no important questions for this Court, the petition should be denied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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